

## **The Benefits of the Commercial Division to the State of New York**

*Drafted by the Commercial Division Advisory Council*

The Commercial Division (“CD”) provides many benefits to the State of New York, its citizens, and its business community. The CD helps New York State to attract and retain businesses and therefore to generate tax revenues and provide jobs. The CD also generates revenue for the legal community in New York State and for the vendors, suppliers and others who benefit economically from legal activities. The CD enables businesses in New York to operate more efficiently and productively by reducing the amount of time and money businesses are required to devote to dispute resolution. The CD also helps to develop a body of New York commercial law which enables businesses to predict the legal consequences of their business decisions and to thereby avoid having to go to court in the first place.

Many states in the United States and many foreign countries are creating business courts and are devoting substantial resources to enhance the operations of their business courts. There is significant competition among major cities, states, and countries to attract complex commercial cases to their business courts. New York needs to compete with these other government entities if it is to continue to attract and retain businesses in New York.

Set forth below is a representative sample of the myriad of materials that discuss the many benefits that specialized business courts like the CD provide. The popularity of business courts continues to grow, and the literature is ever expanding.

Benefits of Business Courts Generally. As the Association of Corporate Counsel<sup>1</sup> has stated in a Policy Statement issued by its Board of Directors:

The United States should have public state court systems that can resolve commercial disputes efficiently. Business courts result in more cost-effective and timely case processing and an improvement in the quality of dispositions. They therefore foster a more favorable environment for creating and maintaining businesses, and as a result enhance the economic well-being of the nation.<sup>2</sup>

Indeed, business courts help to attract and retain businesses and therefore generate tax revenues and provide jobs.<sup>3</sup> Business courts also generate revenue for the legal community and for the vendors, suppliers and all others who benefit economically from legal activities.

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<sup>1</sup> “The Association of Corporate Counsel (ACC) is a global bar association that promotes the common professional and business interests of in-house counsel who work for corporations, associations and other organizations . . . .” The ACC has “more than 40,000 members employed by over 10,000 organizations in 85 countries . . . .” About ACC, available at <https://www.acc.com/aboutacc>.

<sup>2</sup> Association of Corporate Counsel, Board of Directors Policy Statement, *Business Courts*, updated Oct. 18, 2009, available at [www.acc.com/advocacy/upload/ACC-Statement-on-Business-Courts101809.pdf](http://www.acc.com/advocacy/upload/ACC-Statement-on-Business-Courts101809.pdf).

<sup>3</sup> See, e.g., Jens Dammann, *Business Courts and Firm Performance*, U OF TEXAS LAW, PUBLIC LAW RESEARCH PAPER NO. 660, Sept. 17, 2017, available at SSRN: <https://ssrn.com/abstract=2889898> or <http://dx.doi.org/10.2139/ssrn.2889898> (finding that the creation of state business courts is associated with approximately a three-percentage point increase in company performance, as measured by return on assets and that

Many states have explicitly acknowledged the business benefits derived from having a business court. For example:

- **Georgia:** The State of Georgia Court Reform Council acknowledged the advantages of a state having a specialized business court and concluded that: “[t]he creation of a statewide business court in Georgia would promote all these advantages and make Georgia a more attractive and competitive venue for businesses.”<sup>4</sup>
- **Iowa:** “Businesses and attorneys will benefit from the business court’s published body of case law providing guidance and promoting risk assessment for fair and cost-effective resolution of such cases . . . All Iowans should benefit from the creation of a more attractive and cost-effective environment for the resolution of complex business disputes.”<sup>5</sup>
- **Indiana:** “One element of a state’s capacity for gaining ground in national and global marketplaces is whether its legal climate and particularly its courts help advance economic development and the jobs that come with it . . . . With its eye on the state’s economic future, the Indiana Supreme Court has launched the Commercial Court Pilot Project, in part to ‘enhance economic development in Indiana by furthering the efficient resolution of commercial law disputes.’”<sup>6</sup> Moreover, Indiana’s commercial court project was cited “as a factor in Indiana’s reputation as a great place to locate and grow business.”<sup>7</sup>
- **North Carolina:** The Final Report and Recommendation of the Chief Justice’s Commission on the Future of the North Carolina Business Court, observed that the North Carolina Business Court “has been an unqualified success since its inception in 1995” and noted that one of the “many benefits the Business Court has secured for the business community, the court system, and the public at large” includes “Attracting Businesses to North Carolina.”<sup>8</sup>

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companies incorporated in states with access to business courts seem more likely to become the target in a merger with positive cumulative abnormal returns).

<sup>4</sup> The State of Georgia Court Reform Council’s Final Report Submitted to Governor Nathan Deal, Nov. 20, 2017, available at [https://law.georgia.gov/sites/law.georgia.gov/files/related\\_files/site\\_page/FINAL%20REPORT\\_Court%20Reform%20Council.pdf](https://law.georgia.gov/sites/law.georgia.gov/files/related_files/site_page/FINAL%20REPORT_Court%20Reform%20Council.pdf).

<sup>5</sup> *In re the Matter of Establishment of the Iowa Business Specialty Court Pilot Project*, Memorandum of Operation, Iowa Supreme Court, Dec. 21, 2012, at 1 available at [https://www.iowacourts.gov/static/media/cms/MemorandumOfOperation\\_51AB39E424F52.pdf](https://www.iowacourts.gov/static/media/cms/MemorandumOfOperation_51AB39E424F52.pdf).

<sup>6</sup> Randall Shepard, *New commercial court dockets could boost job growth*, INDIANAPOLIS BUSINESS JOURNAL, May 7, 2016, available at <https://www.ibj.com/articles/58427-new-commercial-court-dockets-could-boost-job-growth>.

<sup>7</sup> Mathew Leblanc, *Pilot “commercial court” project praised in report*, JOURNAL GAZETTE, Feb. 26, 2018, available at <http://www.journalgazette.net/news/local/courts/20180226/pilot-commercial-court-project-praised-in-report>.

<sup>8</sup> Chief Justice’s Commission on the Future of the North Carolina Business Court, *Final Report and Recommendation*, Oct. 28, 2004, at 5, available at [http://apps.americanbar.org/buslaw/committees/CL150011pub/materials/reports/NorthCarolinaReport\(2004\).pdf](http://apps.americanbar.org/buslaw/committees/CL150011pub/materials/reports/NorthCarolinaReport(2004).pdf).

- **Rhode Island:** In extolling Rhode Island’s “dedicated forum for businesses to litigate their commercial disputes—the Superior Court Business Calendar,” the *Rhode Island Bar Journal* reports that “[b]usinesses are drawn to states whose courts understand and deftly handle the complexity of business litigation”<sup>9</sup> and describes Rhode Island’s successful business court as a “home run for the Rhode Island business community and their attorneys.”<sup>10</sup>
- **Tennessee:** Tennessee Chief Justice Sharon Lee has observed that business courts have “proven to be an effective tool for business retention” and that such courts have “furthered economic development and enhanced [the] effectiveness of the judicial system by removing complex business cases from the general docket.”<sup>11</sup>
- **Ohio:** The co-chairman of the task force responsible for setting up a specialized commercial docket in five of the state’s largest counties commented that: “ We believe that once word gets out, other business might come to Ohio because they will realize the court system understands their needs . . . . Ohio would be considered a favored state in which to do business.”<sup>12</sup>
- **Wisconsin:** The Business Court Advisory Committee stated that “the commercial docket should improve the administration of justice for all. An efficient process will also enhance Wisconsin’s business climate and promote economic growth.”<sup>13</sup>

Efficiency and Predictability. Business courts enable businesses to operate more efficiently and productively by reducing the amount of time and money businesses are required to devote to dispute resolution. Moreover, “[business] courts’ quick resolutions can . . . make a state more attractive to companies deciding where to locate.”<sup>14</sup> Additionally, “there is some analytic support for the conclusion that commercial cases are being decided more efficiently by business courts and that courts specializing in complex litigation save litigants money.”<sup>15</sup> As former Chief Administrative Judge A. Gail Prudenti stated in a column entitled “Commercial Division of state court vital to NY business” in the *Long Island Business News*: “Litigation is major cost of doing

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<sup>9</sup> Harmony Conti Bodurtha & Catherine A. Shaghalian, *The Business Calendar: A Deeper Bench*, RHODE ISLAND BAR JOURNAL, Vol. 66, No. 5, March/April 2018, at 13, available at [https://www.ribar.com/UserFiles/RIBar\\_Mar-Apr\\_2018\\_Jrnl\\_F.pdf](https://www.ribar.com/UserFiles/RIBar_Mar-Apr_2018_Jrnl_F.pdf), citing Lee Aplebaum, The “New Business Courts, BUSINESS LAW TODAY, Vol. 17, No. 4 March/April 2008, at 4.

<sup>10</sup> *Id.* at 17.

<sup>11</sup> Matthew M. Lubozynski, *How the Tennessee Business Court Affects the Business Community*, MEMPHIS DAILY NEWS, Vol. 130, No. 136, July 15, 2015, available at <https://www.memphisdailynews.com/news/2015/jul/15/how-the-tennessee-business-court-affects-the-business-community/>.

<sup>12</sup> Bruce Cadwalleder, *New Court Will Focus on Complex Business Cases*, THE COLUMBUS DISPATCH, Sept. 3, 2008, available at <http://www.dispatch.com/article/20080903/NEWS/309039613>.

<sup>13</sup> Joe Forward, *Business Court Pilot Project Proposed for Waukesha and Eighth Judicial District*, STATE BAR OF WISCONSIN NEWS, Oct. 26, 2016, available at <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/article.aspx?Volume=8&Issue=21&ArticleID=25174>.

<sup>14</sup> Jenni Bergal, *States Set Up 'Business Courts' for Corporate Conflicts*, STATELINE, Oct. 28, 2015, available at <http://www.governing.com/topics/mgmt/business-courts-take-on-complex-corporate-conflicts.html>.

<sup>15</sup> Applebaum, *Business Courts in the United States: 20 Years of Innovation*, at 878.

business in our society, and in fostering and nurturing a highly-respected forum for resolving those cases I think New York sends a message that this is a state where businesses can flourish and where they can resolve their disputes without wasting time and money.”<sup>16</sup>

Business courts also help to develop a body of commercial law which enables businesses to predict the legal consequences of their business decisions and to thereby avoid having to go to court in the first place. In other words, “[b]usiness court judges have experience in matters involving significant issues of corporate and commercial law and business courts frequently publish a high volume of opinions on issues of interest in business disputes.”<sup>17</sup> Accordingly, “[t]his access to experienced judges and the volume of opinions tends to provide litigants with a greater ability to assess the likely outcome of disputes.”<sup>18</sup> Indeed, “maintenance of a healthy economic atmosphere in any state (*i.e.*, one in which companies will wish to do business) requires predictability in business case rulings, particularly where the sums of money at stake may be large.”<sup>19</sup>

Expansion of Business Courts. The number of business courts in the United States has steadily increased from the first pilot programs established in three states in 1993.<sup>20</sup> Today, at least 25 states have created specialized courts or pilot programs within existing state civil trial courts to handle traditional intra-business disputes and external commercial disputes between business entities.<sup>21</sup>

Many states in the United States and many foreign countries are creating business courts and are devoting substantial resources to enhance the operations of their business courts. For example, in 2018 Governor John Carney of Delaware presented a budget proposal supporting a request by Chief Justice Leo Strine to expand the Chancery Court’s bench from five to seven judges and to add eight new support staff.<sup>22</sup> That proposal was promptly accepted. Similarly, Rhode Island recently added a third judge to its business court: “[t]he rapid growth from one to three Superior Court Justices on the Business Calendar reflects how well this calendar has addressed the litigation needs of the Rhode Island business community tripling in size in just sixteen years . . .

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<sup>16</sup> A. Gail Prudenti, *Commercial Division of State Court Vital to NY Business*, LONG ISLAND BUSINESS NEWS, Feb. 15, 2017, available at <http://libn.com/2017/02/15/prudenti-commercial-division-of-state-court-vital-to-ny-business/>.

<sup>17</sup> Edward J. Coyne, III, *The North Carolina Business Court Evolves: Three Things You Need to Know to Be Up to Date*, THE NATIONAL LAW REVIEW, Mar. 3, 2017, available at <https://www.natlawreview.com/article/north-carolina-business-court-evolves-three-things-you-need-to-know-to-be-to-date>.

<sup>18</sup> *Id.*

<sup>19</sup> W.VA. INDEP. COMM’N. ON JUDICIAL REFOR, FINAL REPORT, Nov. 15, 2009.

<sup>20</sup> Lee Applebaum & Mitchell L. Bach, *Business Courts in the United States: 20 Years of Innovation*, in THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 868 (8<sup>th</sup> Ed. 2017).

<sup>21</sup> *Id.* at 871-872; see also Tyler Moorehead, *Business Courts: Their Advantages, Implementation Strategies, and Indiana’s Pursuit of Its Own*, 50 IND. LAW REV. 397, 399 (2016).

<sup>22</sup> Matt Chiapardi, *Del. Gov. Backs Strine’s Proposal To Expand Chancery Bench*, LAW360, Jan. 25, 2018.

.”<sup>23</sup> North Carolina has also expanded its business court, including a substantial increase in court staff:

With five highly-regarded judges sitting in chambers across four cities, the North Carolina Business Court is more robust than ever. The court staff has also increased over the years. The chambers are now staffed by multiple law clerks (up from what was originally one per judge), a judicial assistant, and a trial court administrator.<sup>24</sup>

Similarly, the South Carolina Business Court Pilot Program grew and improved in 2014 to accommodate rising demand. In 2014, that Business Court was expanded to all South Carolina counties, five new judges were added to accommodate the increase in cases, and the procedures for moving for Business Court assignment were refined.<sup>25</sup>

Competitive Edge. “There is a strong appearance of competition among states and neighboring jurisdictions in creating business courts.”<sup>26</sup> Indeed, many attribute the rapid increase in the number of business courts over the past two decades to states’ desire to compete with the Delaware business courts specifically and to attract business to their own states: “South Dakota and Connecticut boldly proclaimed last year that they want to depose Delaware as the nation’s incorporation capital. Nevada has already reduced its gap with Delaware and is aiming for the top spot as the home to out-of-state corporations.”<sup>27</sup>

Many countries also seek to attract complex commercial cases to their business courts. Indeed, “[c]ompetition among court systems is both national and international. In addition to cities like New York, Chicago, Baltimore, Charlotte, Atlanta, and Miami, countries such as Canada, England, Ireland, France and the Netherlands, among many others have specialized business tribunals.”<sup>28</sup> For example, the French justice ministry recently opened an international commercial court in Paris. The court, which will hear cases in English, was created “in a bid to grab a share of Britain’s £14 billion commercial law market and lure financial institutions away from London before Brexit.”<sup>29</sup>

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<sup>23</sup> Bodurtha & Shaghalian, *The Business Calendar: A Deeper Bench*, at 13.

<sup>24</sup> Coyne, *The North Carolina Business Court Evolves: Three Things You Need to Know to Be Up to Date*.

<sup>25</sup> See South Carolina Supreme Court, Order No. 2014-01-03-02, available at <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2014-01-03-02>; Order No. 2014-07-29-01, available at <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2014-07-29-01>; Order No. 2014-08-13-02, available at <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2014-08-13-02>; Order No. 2014-09-17-03, available at <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2014-09-17-03>.

<sup>26</sup> Applebaum, *Business Courts in the United States: 20 Years of Innovation*, at 877.

<sup>27</sup> Jeff Mordock, *Rival Business Courts Target Delaware*, THE NEWS JOURNAL., Feb. 2, 2015, <http://www.delawareonline.com/story/news/local/2015/01/31/rival-business-courts-target-delaware/22651101/>.

<sup>28</sup> Lee Applebaum, *The Commerce Court’s First Decade*, THE PHILADELPHIA LAWYER, Spring 2009, at 24, available at [https://www.philadelphiabar.org/WebObjects/...woa/.../TPL\\_commerce\\_spring09.pdf](https://www.philadelphiabar.org/WebObjects/...woa/.../TPL_commerce_spring09.pdf).

<sup>29</sup> Catherine Baksi, *Paris Court to Hear English Cases*, THE GLOBAL LEGAL POST, Feb. 9, 2018, available at <http://www.globallegalpost.com/big-stories/paris-court-to-hear-english-cases-3584377/>.

Furthermore, at least three other English-speaking commercial courts in Europe have opened or were slated to open in 2018.<sup>30</sup> In the face of growing international competition and amidst criticisms of complacency, the British business courts have introduced numerous changes aimed at improving its commercial litigation offerings, including technological advancements.<sup>31</sup>

The London Commercial Court promotes itself as a leading forum for the resolution of large, complex commercial disputes. In that connection, on July 8, 2015, the Lord Chief Justice of England and Wales announced the creation of a “Financial List” (a “list” being equivalent to our “docket”) for financial claims of £50 million (roughly \$70 million) or more, or that concern certain complex financial products. Thereafter, the Chief Judge of the Commercial Court, the Honorable Mr. Justice William Blair, came to New York on September 22, 2016 to promote the advantages of the Financial List. This presentation received substantial attention in the New York bar, including in an article from the *New York Law Journal*.<sup>32</sup> In his presentation, Mr. Justice Blair stressed the expertise of the twelve designated Financial List judges and the quick and definitive resolution of disputes.

In addition, on May 18, 2017, the Chancellor of the High Court of England and Wales issued an “Explanatory Statement”<sup>33</sup> which is further evidence of the international competition for commercial cases. The Explanatory Statement states that the new Business and Property Courts of England & Wales which are discussed in the Explanatory Statement “will continue to offer the best court-based dispute resolution service in the world, served by a top class independent specialist judiciary.”<sup>34</sup> The Explanatory Statement also comments that “As Brexit approaches, it is all the more important that the commercial community understands the value of English law and the dispute resolution services provided by the English & Welsh courts.”<sup>35</sup> The fact that the Judiciary of England and Wales have restructured and renamed their “Business and Property Courts” within the last year for the same reasons which gave rise to the creation of the Financial List confirms the need, importance, and urgency of a thriving Commercial Division within the New York State Court system.

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<sup>30</sup> Kate Wilson, *Paris Opens English-speaking Court*, ECONOMIA, Feb. 28, 2018, available at <https://economia.icaew.com/en/opinion/february-2018/paris-opens-english-speaking-court>; see also Tom Mosely, *Why English Courts are Opening in the EU*, BBC, Feb. 28, 2018, available at <http://www.bbc.com/news/uk-politics-42979920>.

<sup>31</sup> John MacKenzie, *Modernising the Courts: Investing in Technology*, THE GLOBAL LEGAL POST, Mar. 2, 2018, available at <http://m.globallegalpost.com/commentary/modernising-the-courts-investing-in-technology-10651314/>; see also Wilson, *supra* note 29.

<sup>32</sup> Phil Albinus, *British Judge Discusses New London Business Court During NY Visit*, NEW YORK LAW JOURNAL, Sept. 28, 2016, available at <https://www.law.com/newyorklawjournal/almID/1202768754021/british-judge-discusses-new-london-business-court-during-ny-visit/>.

<sup>33</sup> Judiciary of England and Wales, *The Business and Property Courts of England & Wales: An Explanatory Statement*, May 18, 2017, available at <https://www.judiciary.gov.uk/wp-content/uploads/2017/03/bpc-explanatory-statement-final-20170518-v2.pdf>.

<sup>34</sup> *Id.* at 2.

<sup>35</sup> *Id.* at 5.